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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1113

NORMAND SMITH and NANCY L. SMITH, and HARRY NEUMANN,

Petitioners,

v.

GOVERNMENT OF THE VIRGIN ISLANDS, HARVEY ALUMINUM (INCORPORATED), and HARVEY ALUMINA, VIRGIN ISLANDS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, Normand Smith, Nancy Smith and Harry Neumann, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on February 28, 1964, and amended on April 10, 1964.

Citations to Opinions Below

The opinion of the District Court of the Virgin Islands is unreported at this time and is printed in the Appendix hereto, page A-23, and in Appellants Appendix submitted herewith, page 71a. The opinion of the Court of Appeals, printed in Appendix hereto, pages A-3-A-23, is reported in 329 F. 2d 135, 4 V. I. ——.

Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1964 and was amended as to costs awarded on April 10, 1964. Timely petition for rehearing was denied on April 10, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Whether expenditure of public moneys for private use, purpose and profit offends the Equal Protection and Due Process clauses of the Bill of Rights granted the Virgin Islands by Act of Congress.

2. Whether the gratuitous grant of public lands to a private corporation for private use offends the Equal Protection clause of the Bill of Rights granted the Virgin Islands.

3. Whether an act of the Territorial Legislature, gratuitously granting public lands to, and authorizing expenditure of public moneys for the benefit of, a private corporation, together with exceptional tax exemptions, subsidies and benefits not granted others, is a special law prohibited by federal statute, 24 Stat. 170.

4. Whether construction and operation of an Alumina plant by a private interest, for private profit, with anticipated incidental benefits to citizens, is for a "public purpose", as defined by this Court.

Statutes Involved

The statutory provisions involved are Section 3 of the Revised Organic Act of the Virgin Islands, 68 Stat. 498, amended, 72 Stat. 1094, Title 48 U. S. C. 1561; and General

Territorial Provisions, Local or Special Laws, 24 Stat. 170, Title 48 U. S. C. 1471. These are printed verbatim in the Appendix, pages A-28-A-31.

The pertinent portion of the Revised Organic Act provides:

> "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws."

The pertinent portion of 24 Stat. 170 provides:

> "The legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> "• • •
>
> "Granting to any corporation, association or individual any special or exclusive privileges, immunity, or franchise whatever."

Statement

Jurisdiction of the District Court of the Virgin Islands was invoked because the cause of action arose within that jurisdiction.

Act No. 814 (Appendix 22a),* ratifying and adopting an agreement between the Government of the Virgin Islands and Harvey Alumina Virgin Islands, Inc., was passed by the Virgin Islands Legislature February 19 and approved by the Governor February 20, 1962.

The agreement, section 1, (Appendix 25a) provides for conveyance by the Government of about 1200 acres of

* When page number is followed by letter "a" reference is to Appellants' Appendix below.

public land to Harvey interests. (Conveyance was made in May, 1962). Section 8 grants the right, but does not obligate Harvey, to sell power and water. Notwithstanding such sales, power and water facilities "shall be deemed not to be devoted to public uses or subject the charges therefore to regulation under Title 30 of the Virgin Islands Code." (Statutory regulation of public utilities). Section 9 grants special tax exemptions and subsidies exceeding those granted qualified applicants under the general Industrial Incentive Program act.

Annex C to the agreement (Appendix 54a) provides that the Government will reimburse Harvey to the extent of $3,000,000 the cost of dredging a channel and turning area to provide access from the sea to Harvey's plant. It was also agreed that 25 acres with access to the basin would be reconveyed to the Government for industrial development. The Government also agreed to maintain the channel and turning area and keep it free from obstructions and dredged to completed dimensions. Harvey is granted the right to use the channel and turning area free of any taxes, excises, duties, fees, charges, imports, or exactions for a period of sixteen years from the first commercial use.

On its part, Harvey agreed, section 4, to commence preparations for the construction of an alumina plant of not less than 100,000 short tons annual capacity. It also agreed, section 6, that during the tax exempt period not less than 75% of Harvey's employees would be legal residents of the Virgin Islands, unless sufficient qualified personnel are unavailable, competence to be determined by Harvey.

Section 12 provides that Harvey may terminate the agreement at any time upon thirty days notice. The Gov-

ernment may terminate only in the event the initial phase of construction shall not have been completed within five years.

On December 12, 1962, petitioners, as taxpayers, filed their suits in the District Court of the Virgin Islands to enjoin expenditure of public funds required by the agreement, and cancellation of the deeds of conveyance.

The Smith complaint against the Government, in which the other respondents intervened, (Appendix 1a) challenges the Government's right to expend public moneys to reimburse Harvey the cost of dredging a channel and turning basin to provide access to its plant, and in maintaining the channel.

The Neumann complaint against the respondents herein (Appendix 6a) challenges the Government's right to give 1200 acres of public land to Harvey as an inducement to install and operate an alumina plant on St. Croix.

On February 9, 1963 respondents and interveners filed motions to dismiss, under (Rule 12(b); (Appendix 12a-16a) supported by affidavits, Exhibits 1-8, upon the grounds that the petitioners, as taxpayers, had not contributed and would not contribute directly to funds from which payments would be made and with which the lands were acquired, and, therefore, lacked standing to sue. Each of the motions also contained a motion for summary judgment, under rule 56(b), supported by the same affidavits. The affidavits, Exhibits 1-8, generally go to the question of petitioners' standing as taxpayers to maintain the action. They are recited in respondents' appendix below, pages 1b-17b. The cases were consolidated in the District Court and in the Court below.

The District Court, by order of July 10, 1963, granted the motions to dismiss with costs and attorney's fees,

upon the ground that the petitioners, as taxpayers, lacked standing to sue, citing authority of *Massachusetts v. Mellon*, 262 U. S. 447, *Doremus v. Board of Education*, 342 U. S. 429, and *Ottley v. Government of the Virgin Islands*, 161 Fed. Supp. 210, 3 V. I. 292. The Court also stated that, absent ruling on the motion to dismiss, it would have granted the motion for summary judgment on authority of *Ferguson v. Skrupa*, 372 U. S. 726.

The Court below vacated the Order dismissing the petitions and remanded the cause with directions to the District Court to enter summary judgments against petitioners. In so doing, the Court held that, since matters outside the pleadings were presented to and not excluded by the court, the court was procedurally precluded from dismissing the petitions by Rules 12(b) and (c) and compelled to proceed under Rule 56 pertaining to summary judgment.

In determining that summary judgment should be entered, the court confined the issues to whether or not the legislation "serves" a public purpose, holding that legislative declaration thereon is "well-nigh conclusive," and that here the legislative record provided a rational basis for the enactment.

Reasons for Granting the Writ

1. In its order of dismissal the District Court stated:

> "The issues presented by these consolidated cases have weighed heavily on this Court because of their far-reaching import and concern to the Virgin Islands."

The effect of the opinion below is of grave importance and concern to the people of the Virgin Islands. If permitted to stand, it can and probably will be interpreted

as a license to the government to dissipate public land and treasure for the benefit of favored individuals under guise of public purpose so declared by legislative fiat.*

It amounts to a subtle erosion of a right to equal treatment under law secured to the people of the Virgin Islands by their charter.

2. Summary disposition by the court below, by technical interpretation and application of a rule upon a matter which was not contemplated or urged by the parties, deprives the citizens whom petitioners represent of any opportunity to be heard upon the determinative issue. (Petition for rehearing pp. 7-8). Such action constitutes a departure from the accepted and usual course of judicial proceedings warranting review by certiorari.

The issue upon which petitioners sought review below was whether they, as taxpayers, had standing to maintain their suits against the government. This issue was resolved in favor of the taxpayer in an opinion rendered the same day by the court below in *David Smith v. Government of the Virgin Islands*, 329 F. 2d 131.

The questions which are submitted here were argued and discussed below to demonstrate the importance of the taxpayer's right to seek to restrain illegal government action as well as to counter the statement of the District Court regarding summary judgment.

It is and has been contended throughout these proceedings that gifts of public land and money to Harvey, as

* Legislative power of the Virgin Islands is vested in a unicameral legislature composed of eleven senators. The legislative districts of St. Thomas and St. Croix each elect two senators, that of St. John elects one. The other six are elected at large. (Revised Organic Act, Sec. 5). Executive power is vested in a Governor appointed by the President, by and with advice and consent of the Senate. (Revised Organic Act, Sec. 11).

an inducement to locate an industrial plant on St. Croix, is illegal. If the government has a legal right to make such gifts to a favored individual, then it is conceded that the court below was correct in holding that courts should not question the wisdom of the exercise of such right.

3. The opinion does not appear to determine whether the governmental grant was or was not legal, but if the opinion means that it was, then it would appear to be in conflict with principles of law established by this Court in *Citizens Savings and Loan Association* v. *Topeka*, 20 Wall. 655, and *Cole* v. *La Grange*, 113 U. S. 1, and with principles enunciated in *Dodge* v. *Mission Township*, (CCA 8) 107 Fed. 827, 54 L.R.A. 242, and *Sutherland-Innes Co.* v. *Evart* (CCA 6) 86 Fed. 597, which hold that financial aid by taxation or pledges of public credit as an inducement to private manufacturers is for a private rather than public purpose.

4. If the opinion means, as it appears to, that the courts should not question whether an act is for a private or public purpose when it has been declared to be for a public purpose by the legislature, then the opinion would appear to be in conflict with the principle stated in *Dodge* v. *Mission Township*, supra, that "a legislature cannot make a private purpose a public one by its mere fiat."

5. It would appear that the court below, as well as the District Court, misconstrued the import and intent of *Ferguson* v. *Skrupa*, 372 U. S. 726, in consideration and determination of the case at bar. The court was not called upon to sit as a super-legislative body to determine the wisdom of the Act. It was asked to determine whether

petitioners and other citizens were deprived of the right of equal protection of law by the gratuitous grant of land and treasure to a favored corporation. It is not believed that this Court intended in the *Ferguson* case to imply that legislation which impairs real and established constitutional guarantees should not be declared invalid, yet this seems to have been the interpretation of the court below.

6. If the opinion means, as it appears that it does, that courts should not question legislation which is discriminatory, where the public purpose has been declared by the enactment, it would appear to be in conflict with the principal stated by this Court in *Baker* v. *Carr*, 369 U. S. 186, where it was said:

> "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."

7. The opinion below is silent as to whether or not the challenged legislation is a special law proscribed by 24 Stat. 170.

There can be little, if any, doubt that Act No. 814 is a special law, granting special and exclusive privileges and immunities to a corporation; that the prohibitions of the federal statute apply to the legislature of the Virgin Islands, and that the Act was passed in violation of such prohibitions.

This question, while raised for the first time in the Court of Appeals was entertained by that court. It was

thoroughly briefed and argued and the Court granted additional time for submission of briefs on the question. (Petition for rehearing pp. 3-4).

In remanding the cause with instructions to the District Court to enter summary judgment against petitioners, in spite of the apparent violation of the federal statute, and without giving the parties reasonable opportunity, as required by Rule 12 (b), to "present all material made pertinent to" a motion for summary judgment which, in this case, would have been a suggestion of the federal statute, it would appear that the court below so far departed from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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